United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig. with affidavit of mailing

74-1838

B P/S

To be argued by
JAMES A. PASCARELLA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1838

UNITED STATES OF AMERICA,

Appellee,

—against—

OSMUNDO RODRIGUEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

Osmundo Rodriguez appeals from a judgment of the United States District Court for the Eastern District of New York (Neaher, *J.*), entered on May 24, 1974, which judgment convicted appellant, after a jury trial, of three counts in an indictment charging him with conspiring to distribute and thereafter distributing to an undercover agent, on two occasions, cocaine in violation of Title 21, United States Code, Sections 841(a)(1) and 846 and Title 18, United States Code, Section 2.* Appellant was sentenced to a term of two years on each of the three counts in the indictment, these terms to run concurrently. In addition, a special parole term of ten years was imposed. Appellant is free on bail pending this appeal.

* Appellant was indicted along with John W. Osborne. Osborne, who pleaded guilty to the conspiracy count, was a witness for the Government at the trial.

On appeal, appellant claims that error was committed in that the District Court failed to rule on the voluntariness of several of his post arrest statements and that plain error was committed when the District Court permitted defense counsel to "voir dire" the witness (through whom those statements were elicited) in the presence of the jury. Appellant also claims there was an "omission" on the part of the Government to call a witness and that the Government's summation included an unwarranted comment concerning the credibility of the Government's witnesses.

Statement of the Case

A. Proceedings Prior to Trial

The indictment herein was filed on August 17, 1972. On September 20, 1972—following his arraignment and plea of not guilty—appellant moved to discover, among other items of evidence, statements made by him and in the Government's possession.* Pursuant to that motion, the Government provided counsel with a copy of some handwritten notes compiled by Assistant United States Attorney Francis J. Sheerin on July 24, 1972, outlining his interview of appellant following appellant's arrest.

Sheerin's handwritten notes, dated July 24, 1972, show that appellant was interviewed by Sheerin over the course of a twenty minute period of time in Sheerin's office. The notes show that the defendant arrived at 4:20 P.M. and that Sheerin "did all talking." Thereafter, the appellant was sent from the room and Sheerin spoke with an unidentified agent. A short time later, appellant was returned to Sheerin's office and warned of his rights and shown

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* Contrary to the legend on the docket sheets, that motion of September 20th contained no demand that such statements, if they existed, be suppressed, nor that any other evidence be suppressed. (See Appellant's Motion of September 20, 1972; Government's Appendix, A. 1).

a written form which included warnings as to his rights. Thereafter, appellant stated that he had been using cocaine for a year and that with regard to the subject transactions, for which he was arrested, he knew only about a "quarter of a piece." Sheerin's notes continue: "He admits that transaction. Then he said he brought stuff to Osborne [appellant's co-defendant] 2nd time (27th) i.e., the approx. 2 ounces in complaint." Sheerin's notes also reflect that appellant stated his source to be one "Tocajo". His notes conclude with an assessment by Sheerin that appellant "spoke and understood English."

Sheerin's notes of his interview of appellant were complemented by a report by Agent Edward M. Coghlan, an undercover agent in the case, who was the agent referred to in Sheerin's notes and who was present during the interview. Coghlan's report stated, in relevant part, as follows:

> "On July 24, 1972, AUSA Frank Sheerin interviewed Osmundo Rodriguez at the Eastern District of New York in the presence of S/A's Lynn Wheeler and Edward Coghlan.
>
> Mr. Sheerin advised Rodriguez of his constitutional rights as per BND-13A at approximately 4:35 P.M. Rodriguez stated that he understood his rights and said he was willing to make statements about his dealing with S/A Coghlan. During the course of the interview, Rodriguez admitted that he had personally used cocaine for about one year. Rodriguez admitted that he had brought a quarter ounce of cocaine, which he termed a quarter piece, to 265 Hawthorne Street on June 23, 1972 as a sample for S/A's Coghlan and Abbott. Rodriguez also admitted that on June 27, 1972, he brought about two ounces of cocaine to 265 Hawthorne Street which S/A's Coghlan and Abbott later purchased. Rodriguez stated that the source of the cocaine was from an

> individual that he knew as Tocajo, but he did not know anything else about this individual. Rodriguez was advised by AUSA Sheerin that the Waterfront Commission would be notified of his arrest and that his license as a checker for the Waterfront Commission would most probably be suspended whether or not he decided to cooperate with the government. Rodriguez stated that he understood."

On February 19, 1974, the date the trial was to begin, Government trial counsel, James Pascarella, provided defense counsel with a copy of Agent Coghlan's report. He explained that both he and Sheerin had been unaware of the report's existence until recently and therefore it had not been given to defense counsel previously ( ). Defense counsel thereafter apprised the Court of the Government's failure to provide counsel with the agent's version of the interview of July 24, 1972.

In his opening statement to the Court, defense counsel stated, in part, as follows:

> Mr. Handman: If your Honor please, what I would like to bring before the Court now is not exactly a suppression type motion but rather an instance in my opinion is the failure of the Government to comply with the prior mandates of this Court in respect to furnishing of particulars. In effect I believe we have just been advised by the United States Attorney this morning of a new statement or alleged statement of the defendant.
>
> When this matter was gone into at great length on several occasions before Judge Rayfiel who had the case prior to your Honor, I was advised specifically that there were no specific statements" (Transcript of February 19, 1974, p. 3A; Appellant's Appendix, p. 6A).

Thereafter, in an extensive colloquy, the Government stated, and the Court eventually accepted, that Agent Coghlan's report related to precisely the same conversation as had been outlined by Sheerin and had been previously supplied to defense counsel. Although defense counsel did not expressly state the relief that he requested, it seems from the colloquy that he desired to have Agent Coghlan's testimony as to the defendant's statements to Sheerin excluded. The sole reason advanced by defense counsel was the failure of the Government to supply Coghlan's report earlier during the pre-trial discovery proceedings.* At no time during the colloquy did counsel challenge the evidence as having

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* The District Court responded to defense counsel, in part, as follows:

> So that I feel it is difficult to see prejudice to the defendant or indeed his counsel in terms of preparing this case for trial.
>
> I suppose it can be said that he is now confronted with the fact that there is a corroborative witness who was present, the Government agent who heard the statements made, but I think that clue was given in the original statement of Mr. Sherrin, that he sent the defendant out of the room and spoke with the agent. He did not identify the agent. No request was made for identification of the agent.
>
> * * * * *
>
> Under the circumstances, construing your motion in whatever way you described it, either a motion to suppress the use of this particular Court Exhibit I [Coghlan's report] for any purpose whatsoever or as taxing the Government with failure to offer a document which would be material in some way for the defense, I think I shall overrule your motion, deny it, that is, believing on the statement of the Assistant that there was no deliberate intent to conceal it and that it was made known to the defense as soon as it came to the attention of Mr. Pascarella to whom the case was assigned and there is no indication that it was previously in the United States Attorney's file. (Transcript of February 19, 1974, pp. 19A-20A; Appellant's Appendix, pp. 22A-23A).

been obtained under either coercive circumstances or as due to some defect in administering the *Miranda* warnings. Nevertheless, the Court stated towards the end of the colloquy and after rejecting defense counsel's argument:

> "The statements that were uttered, I would say, if made voluntarily after due warnings, after constitutional rights, certainly would be admissible. I am contesting the writings."

Defense counsel responded as follows:

> "Would your Honor grant the privilege of a voir dire of any statement at such time rather than have it now?" (Transcript of February 19, 1974, p. 21A; Appellant's Appendix, p. 24a).

Thereafter, no further mention was made of the admissibility of the statements and the Government proceeded to supply defense counsel with several items of 3500 material.

B. The Trial

(1)

On June 22, 1972, special agents of the Drug Enforcement Administration, Barry Abbott and Edward Coghlan, acting in an undercover capacity, went to apartment 1D at 265 Hawthorne Street, Brooklyn, New York. This was the residence of John Osborne. Their purpose in going there was to arrange for the purchase of cocaine (65-67, 195, 306-307; numbers in parenthesis refer to pages of the trial transcript).

At the apartment, Osborne informed the agents he could get one eighth of a kilogram of cocaine that would take two "cuts" and sell it to them for $2,200. He stated that the drugs were not his merchandise and that he would have to contact a Cuban friend who would deliver it.*

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* During the defense case at trial, appellant's wife testified that she and appellant were from Cuba (368).

Osborne advised the agents to call him that evening (67-68, 307-308). As arranged, the agents called Osborne that same evening, and they were advised that the cocaine would be available the following day.

The following day, June 23, 1972, at about 5:30 P.M., the agents went to Osborne's apartment. He admitted them and advised them that he would call his connection in a few minutes. Osborne made the call and was heard to say: "the guys are here . . . [w]hen are you coming over?" After the telephone call, Osborne stated that his connection would becoming over in about forty-five minutes with a sample of the cocaine (69-71, 196, 308-309).

At about 7:00 P.M., the buzzer in Osborne's apartment rang. Osborne spoke over the intercom and invited the person on the other end to come up. Osborne next stated: "my man is downstairs and he is coming right up." Appellant then arrived at the door of the apartment. He was admitted and went into the kitchen with Osborne (72-73, 310). Osborne testified that once appellant was in the kitchen, he produced an ounce of cocaine, gave Osborne a quarter of an ounce to sell to the agents as a sample and kept the remaining cocaine (197-198).

Thereafter, Osborne, leaving appellant in the kitchen, came into the living room where the agents were waiting, handed them the sample of cocaine wrapped in aluminum foil and stated that if the agents liked the sample, they could purchase the full eighth of a kilogram as originally discussed. The agents performed a "burn test" on the sample and were satisfied that it was cocaine. They stated that they would make the purchase. Osborne then called in appellant and introduced him to the agents as "Ray." Appellant stated to the agents that the eighth kilogram of cocaine would be the same quality as the sample, which he stated weighed a quarter of an ounce. He also

reaffirmed the fact that the price for the eighth was $2,200 and said that he would return with it in forty-five minutes (71-75, 198-199, 311-312).

Appellant left the apartment at approximately 7:05 p.m. The agents waited until 8:50 p.m. and told Osborne they could wait no longer for appellant. They advised Osborne that they would contact him on Monday, June 26, 1972, paid him $100 for the sample and left (200, 313).

On June 26, Abbott and Coghlan were unable to contact Osborne, but were successful in meeting with him on June 27, at about noontime. Osborne informed the agents that appellant had shown up with the eighth of cocaine on the evening of June 23, after they had left, and, since they were not there, he had to return the package. Plans were made for Osborne to call the agents later in the day to arrange once again for the purchase of the eighth (79-80, 201, 314-315).

Osborne contacted the agents later that day, and it was eventually agreed, after Osborne had spoken to appellant (and at appellant's suggestion) that the eighth would be sold in two transactions. The first two ounces would be sold to the agents for $1,100, then appellant would take this money, use it to acquire another two ounces from his source and then sell those two ounces to the agents for $1,100 (81-84, 203-204, 316-316a).

At approximately 8:15 P.M. on the same evening, Abbott and Coghlan went to Osborne's apartment. He gave them a plastic bag containing two ounces of cocaine. They tested it and paid Osborne $1,100 for the package.* Osborne ad-

* Osborne testified that he had gone to appellant's lamp shop on Roger's Avenue, Brooklyn, to pick up the two ounces of cocaine (204-205, 246-247).

vised that he would be taking the money to appellant, that he would return and that, shortly thereafter, appellant would come to his (Osborne's) apartment with the other two ounces of cocaine for the agents. Osborne said he had appellant's automobile downstairs and would use that to deliver the money.

All three then left the apartment and Osborne was observed getting into appellant's car. He was followed by surveillance agents to appellant's shop and then was followed back to his apartment. Osborne returned to his apartment by bus, having left the car in front of appellant's place (84-86, 204-207, 183-186, 317-318). Osborne testified at trial that, while at appellant's shop, he gave the $1,100 to appellant who advised him that he (appellant) would bring the cocaine to Osborne's apartment in about a half hour (206-207).

Later on, the agents returned to Osborne's apartment and waited there with him for appellant to arrive with the drugs. When appellant had not arrived by approximately 11:00 P.M., the agents and Osborne decided to leave. As they came to the lobby area, they saw appellant, opened the door for him and all four men went upstairs to Osborne's apartment. Osborne and appellant went into the kitchen where appellant gave Osborne two ounces of cocaine. While appellant remained in the kitchen, Osborne brought the drugs out to the agents, and they performed a burn test. The package was also weighed. The agents asked Osborne who was to be responsible if the cocaine turned out to be of poor quality. He answered he would be responsible but said that appellant would be available for any complaints. The agents then paid Osborne $1,100 and left the apartment. Appellant left a short time later (87-91, 207-210, 318-321).

(2)

On July 24, 1972, Osmundo Rodriguez was arrested by Agent Coghlan. According to Agent Coghlan's testimony, appellant was, at that time, advised of his rights. He was again advised of his rights at the Bureau of Narcotics and Dangerous Drugs office during processing. Thereafter, when appellant was brought to the United States Attorney's Office, he was advised of his rights and shown an advice of rights form. He indicated he understood these rights and then made the statements detailed above (327-330, 334-336).

At the point in trial when Agent Coghlan was about to testify regarding appellant's post arrest statements, appellant's counsel requested that he be permitted to conduct a "voir dire on the rights being administered to the defendant" (R. 329-330).* Defense counsel was initially rebuffed by Judge Neaher who didn't believe that a voir dire was necessary "if Mr. Pascarella will ask this witness what was said" (330). The Assistant then proceeded to elicit the third set of warnings given appellant. Thereafter, defense counsel stated that he wished a voir dire to inquire about the voluntary nature of any statements and to "go into the circumstances, who was present, the language used, and whether or not the defendant was able to understand what was transpiring at that time" (330-331). Judge Neaher acceded to that request.

The main thrust of counsel's questions on the voir dire went to whether or not appellant understood his rights (R. 331-333). In pursuance of that objective, counsel high-

* By that point in Coghlan's testimony, he had already testified that appellant had been twice warned as to his rights. In recounting those instances, Coghlan detailed the rights given to appellant (327-329). At no time during that portion of Coghlan's testimony did defense counsel request a voir dire.

lighted the fact that appellant was orally warned of his rights on three separate occasions in addition to having been shown an advice of rights form (331-332). He also established that appellant had stated, even before his interview with Sheerin, that his cocaine source was a man by the name of Tacajo and that appellant had stated to the agent that he understood his rights (332-333).

Following the "voir dire"—all of which was conducted in the jury's presence—the following brief colloquy took place:

> Mr. Handman: I just want to renew my objection to any evidence of any admissions made to Mr. Coghlan on the basis that this was not furnished to me in the discovery and inspection material ordered by the Court previously and that [the] only disclosure of a conversation had was a conversation with Mr. Sheerin.
>
> Mr. Pascarella: Your Honor has already ruled on that. That has to do with both of them being present and both having heard it. We turned over the statement from Mr. Sheerin which your Honor found did not differ from the statements which Mr. Coghlan said he made.
>
> The Court: I will adhere to that ruling (334).*

Thereafter, Agent Coghlan testified as to the statements made by appellant to Sheerin (334-336).

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* At the Assistant's suggestion (333), the foregoing colloquy was held at side bar. Although no objection as to the voluntariness of appellant's statements was made at that time, nor objection made to the form of the *Miranda* warnings, defense counsel, the following day, after the Government had rested its case and in the midst of the testimony of the sole defense witness (appellant's wife), moved for a mistrial on the ground that the *Miranda* warnings "were not thorough enough" (389). The motion was denied. Judge Neaher, however, invited defense counsel "to place the defendant on the stand . . . and make a record in this matter" (390). The invitation was never accepted.

ARGUMENT

POINT I

No error was committed by the District Court in connection with the admission in evidence of appellant's post-arrest statements.

Relying upon *Jackson* v. *Denno*, 378 U.S. 368 (1964) and the provisions in Section 3501(a), Title 18, United States Code, appellant urges that reversible error was committed when the "voir dire" of Agent Coghlan regarding his post-arrest statements was conducted in the presence of the jury. As part of the same contention, appellant urges that the Court failed to rule on the "voluntariness" of the statements made by him.* According to appellant, those two factors deprived him of a fair trial. Appellant's contentions are without merit.**

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* In his brief on appeal, appellant seems to initially distinguish the issue of voluntariness from the question of whether Miranda warnings "were properly administered" (Appellant's Brief, p. 7). The remaining portion of brief, however, seems to treat both of these separate issues (see *Michigan* v. *Tucker*, — U.S. —, 94 S. Ct. 2357 (1974) under the simple heading of voluntariness.

** Even prior to the decision in *Jackson* v. *Denno*, *supra*, and the enactment of Section 3501(a), the practice in this Circuit had traditionally been to conduct inquiries as to voluntariness of post-arrest statement out of the jurors' presence. See, *United States* v. *Aviles*, 274 F.2d 179, *cert. denied*, 362 U.S. 974 (1960); *United States* v. *Leviton*, 193 F.2d 848 (1951), *cert. denied*, 343 U.S. 946 (1952); *United States* v. *Gottfried*, 165 F.2d 360 (1948), *cert. denied*, 333 U.S. 860 (1948); *United States* v. *Lustig*, 163 F.2d 85, *cert. denied*, 332 U.S. 775 (1947). Certainly, *Jackson* v. *Denno*, *supra*, has reinforced this practice. However, 18 U.S.C. § 3501(a), though addressing this question, must be viewed as being directory and not mandatory in nature. This section

[Footnote continued on following page]

(1)

At no time prior to the trial, during the pre-trial discovery proceedings, did appellant move to suppress any of the statements that he made to the Assistant United States Attorney Sheerin. On February 19th, when the parties appeared for trial and before the jury was sworn, counsel complained that the Government had not provided him with Agent Coghlan's narrative description of the statements made by appellant to Sheerin. At that time, he did not request that the statements be suppressed as having been made involuntarily or in violation of the procedural safeguards of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). After rejecting appellant's complaint, the District Court gratuitously remarked that the statements of the appellant would be admissible ". . . if made voluntarily after due warning, . . ." (Transcript of February 19, 1974, p. 21A, Appellant's Appendix, p. 24A). Even at that time, appellant's counsel did not assert a claim which would have placed in issue the voluntariness of the statements. He simply requested the privilege to conduct a "voir dire" at the time that the statements were to be admitted into evidence (*id.*). In short, appellant's counsel made no offer to prove nor did he other-

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did not create additional rights in a defendant. *United States* v. *White*, 417 F.2d 89 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1969). Thus, an examination of the legislative history of § 3501(a) (see, S. Report No. 1097, 90th Cong., 2nd Sess. 88 (1968); 1968 U.S. Code Cong. and Adm. News 2112, 2123-2138) indicates that it was directed at securing the admissibility of confessions. The statute was certainly not designed to establish a per se right to a voluntariness hearing, before the court alone, in the absence of a claim of involuntariness or the failure to request a hearing out of the presence of the jury. Indeed, the statute simply states that the judge's "determination" must be made outside the jury's presence and is silent as to whether the hearing upon which that determination is based must also be held outside the jury's presence, particularly where the statement itself is not elicited during the course of the hearing. At bar, Judge Neaher made his determination outside the jury's presence (333-334).

wise expressly dispute the admissibility of the statements on grounds contemplated by *Jackson* v. *Denno, supra,* or Section 3501(a).

At the juncture in Agent Coghlan's testimony where the prosecutor sought to elicit appellant's statements made in the presence of Sheerin and Coghlan, counsel requested the "voir dire" that he had mentioned before the trial began. He stated that he wished to ". . . inquire *generally* about the voluntary nature of any statements, . . . to go into the circumstances, who was present, the language used, and whether or not the defendant was able to understand what was transpiring at that time" (emphasis added) (330-331). He did not request that the voir dire be conducted outside the presence of the jury. Moreover, when he had concluded his brief inquiry, counsel's sole objection was based upon the same contention that he had made previously with respect to the Government's failure to supply Agent Coghlan's report (334). Appellant's counsel made no objection concerning the voluntary nature of the statement nor the completeness of the *Miranda* warnings.* Finally, during the summation, in urging the jury to reject the evidence of appellant's post-arrest statements defense counsel remarked that appellant has been "supposedly advised of his legal rights three times," . . . (404).

Under the foregoing circumstances, it is quite clear that appellant's claims with regard to the conduct of the voir

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* Appellant does not claim on this appeal that the statements he made were obtained in violation of *Miranda* or otherwise involuntary. Plainly, they were not. As such, even if a technical error occurred, it was harmless. See, *Pinto* v. *Pierce,* 389 U.S. 31 (1967); *United States* v. *Feinberg,* 383 F.2d 60, 70 (2d 1967); *United States* v. *Plount,* 452, F.2d 606, 607 (9th Cir. 1971); *Lott* v. *United States,* 445 F.2d 858, 859 (9th Cir. 1971); *United States* v. *Smith,* 418 F.2d 1294, 1295 (5th Cir. 1969); *Tooisgah* v. *United States,* 137 F.2d 713, 713 (10th 1943); *Ramsey* v. *United States,* 33 F.2d 699, 700 (8th Cir. 1929).

dire of Agent Coghlan in the presence of the jury is without merit. On the record before this Court it is clear that appellant should be accorded no right to seek review of that procedure either by the virtue of his failure to object to the jury's presence or his failure to request their exclusion;* or because of the apparent strategy that his counsel had adopted in seeking to undermine the probative value of his statements because appellant had been warned three times of his rights, a strategy which was obviously enhanced by conducting the voir dire of Coghlan in front of the jury.**

(2)

Appellant also urges that the District Court failed to make a "determination," as required by Section 3501(a), that his statements to Sheerin and Coghlan were voluntary. It would be sufficient to answer this contention by simply

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* *United States* v. *Indiviglio*, 352 F.2d 276, 279 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Pinto* F.2d (2d Cir. Slip Op. 5089, 5097-5098); *Gerberding* v. *United States*, 471 F.2d 55, 61 (8th Cir. 1973); *United States* v. *Rebon-Delgado*, 467 F.2d 11, 13 (9th Cir. 1972); *United States* v. *Everett*, 457 F.2d 813, 814 (9th Cir. 1972), *cert. denied*, 409 U.S. 1026 (1972); *United States* v. *Stevens*, 445 F.2d 304, 305 (6th Cir. 1971), *cert. denied*, 404 U.S. 945 (1970); *United States* v. *Monroe*, 437 F.2d 684, 685 (D.C. Cir. 1970); *United States* v. *Carter*, 431 F.2d 1093, 1097 (8th Cir. 1970); *Jacobson* v. *People of State of Calif.*, 431 F.2d 1017, 1018 (9th Cir. 1970); *Moreno* v. *Beto*, 415 F.2d 154, 158 (5th Cir. 1969); *United States* v. *Frazier*, 385 F.2d 901, 903 (6th Cir. 1967); *Woody* v. *United States*, 379 F.2d 130, 131 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 961 (1967) and *Evans* v. *United States*, 377 F.2d 535, 537 (5th Cir. 1967).

** Where defense counsel "makes a deliberate decision as a matter of trial strategy to by-pass challenging the voluntariness of the confession in any way . . ., the defendant has waived his right to a hearing . . . on the issue," *United States ex rel Cruz* v. *LaVallee*, 448 F.2d 671, 675 (2d Cir. 1971), *cert. denied*, 406 U.S. 958 (1971); *Henry* v. *Mississippi*, 379 U.S. 443 (1965); *Fay* v. *Noia*, 372 U.S. 391 (1963); *United States ex rel Bruno* v. *Herold*, 408 F.2d 125 (2d Cir. 1969), *cert. denied*, 397 U.S. 957 (1970), and, the Government maintains, he is precluded from asserting the claim on appeal.

stating that, at the time the statements were admitted, appellant never objected to their admission in evidence upon voluntariness grounds. In all events, it can be fairly implied that Judge Neaher, having in mind the issue of voluntariness, would not have allowed the statements to have been admitted without having satisfied himself on the issue of voluntariness. See, *Sheer* v. *United States*, 414 F.2d 122, 125 (5th Cir. 1969), *cert. denied*, 396 U.S. 946 (1969). Finally, when on the day following Agent Coghlan's testimony appellant's trial counsel finally made an objection on *Miranda* grounds, Judge Neaher expressly rejected the contention (389-392).

(3)

Appellant also suggests that he was prejudiced because pursuant to a request during pre-trial discovery, the Government provided him with his statements to Assistant United States Attorney Sheerin and, then, on the eve of trial provided appellant with the report of an agent who was also present during these admissions. This report, apparently, had not been forwarded to the Assistant then in charge of the case, and its existence did not become known to the United States Attorney's Office until the eve of trial when another Assistant United States Attorney was in charge of the prosecution. The report attributed the same statements to appellant as did Sheerin's notes, which appellant had received over a year before. Appellant made a "suppression type" motion seeking to have the statements in the report withheld from evidence. The motion was denied.

A comparison of Sheerin's notes with the agent's report of appellant's statements leaves no doubt that each document attributes the same statements to appellant. Since appellant had these statements in his possession for more than a year before trial, it is difficult to see any surprise or prejudice as a result of his getting another report of the same statements on the eve of trial. In effect, appellant

already had what the report contained. It would deny reason to entertain the belief that appellant could have been prejudiced by not having the report earlier. *United States* v. *Killian*, 368 U.S. 231 (1961); *Rosenberg* v. *United States*, 360 U.S. 367 (1959); *United States* v. *Annunziata*, 293 F.2d 373 (2d Cir. 1961), *cert. denied*, 368 U.S. 919 (1961).

POINT II

The Government was under no "mandatory obligation" to call Assistant United States Attorney Sheerin as a witness.

Appellant contends that the use by the Government of Agent Coghlan's testimony concerning the admissions made by him to Assistant United States Attorney Sheerin, rather than the use of Sheerin's testimony, is reversible error. Appellant's argument runs as follows: (1) the prosecutor, in his opening, told the jury that Sheerin would be called as a witness; (2) there was no valid reason not to call Sheerin as a witness; and (3) Agent Coghlan's testimony violated the hearsay rule and the best evidence rule.

The Government does not understand the contention that appellant is making. Quite certainly, Agent Coghlan's testimony concerning what he had heard from appellant was neither in violation of the hearsay rule nor the best evidence rule. See, *On Lee* v. *United States*, 343 U.S. 747, 756 (1952). Appellant has cited no cases which hold to the contrary. Although appellant seems to be saying that the Government has an obligation to call two witnesses to the same event, a doubtful proposition, see, *United States* v. *D'Angliolillo*, 340 F.2d 453, 455 (2d Cir.), *cert. denied*, 380 U.S. 955 (1965), it should be noted he did not choose to call Sheerin as a witness during the defense case. Furthermore, appellant's trial counsel used the "failure" of the Government to call Sheerin to his own advantage,

when, in his summation, he urged the jury not to believe the testimony of Agent Coghlan because of that failure (405, 420).*

An equally meagre part of appellant's contention is its underlying premise that the jury was even told that Sheerin would be called as a witness. Appellant urges that the following statement in the prosecutor's opening, coupled with the record in the case, "clearly demonstrated that the unidentified individual alluded to within the prosecutor's opening statement was Assistant United States Attorney Sheerin" (Appellant's Brief, p. 12):

> And finally, the Government will call one other witness. At this time, ladies and gentlemen, I will not reveal his name to you, but in substance his testimony will go to Osmondo Rodriguez supplying John Osborne with the cocaine which was distributed to the undercover agents. Yes, this witness will testify as to the direct participation of Osmundo Rodriguez, and these narcotics transactions (21).

It is obvious from a reading of the transcript of the Government's opening statement that this argument is specious and the statement attributed to the prosecutor by appellant is erroneous. Aside from whether or not error would be committed were the Government to state that it would call a particular witness at the outset and change trial strategy and not do so during trial, "a perusal of the record" (Appellant's Brief, p. 11) makes it crystal clear that the witness who would "testify as to the direct participation of Osmundo Rodriguez, and these narcotics transactions" was not an Assistant United States Attorney but

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* Of course, it was far better trial practice for the Government to call as a witness the agent as opposed to the Assistant United States Attorney. Cf. *United States* v. *Puco*, 436 F.2d 761 (2d Cir., 1971), *cert. denied*, 414 U.S. 844 (1973); *United States* v. *Block*, 88 F.2d 618 (2d Cir., 1937), *cert. denied*, 301 U.S. 690 (1936).

was, indeed, the co-defendant, John Osborne. Certainly, it cannot be disputed that Osborne testified. Certainly, Assistant United States Attorney Sheerin could not give testimony of appellant's *direct* participation in the crimes charged. That testimony could only come from the undercover agents (both of whom testified) or Osborne.

In sum, the Government fails to see what "mandatory obligation" it had to call the Assistant United States Attorney as a witness, much less why, if he were a necessary witness, he was not called as a defense witness.

POINT III

No error was committed in the Government's summation.

Appellant contends that reversible error was committed when the prosecutor told the jury that if they believed that the Government witnesses lied then they should acquit appellant of the crimes charged against him in the indictment. When viewed in the context of defense counsel's summation, this claim loses any semblance of merit.

In addition to the credibility of the witness Osborne, the main theme of defense counsel's summation was the credibility of the Government undercover agents Abbott and Coghlan. Throughout the summation, defense counsel sought to create the impression that Coghlan and Abbott, out of zeal, had fabricated the conversations they had had with appellant during the course of his criminal conduct and that Coghlan, particularly, had either fabricated appellant's post-arrest statements or that they had been cuchered from appellant under oppressive or ambiguous circumstances. Thus, counsel pointedly remarked that Coghlan and Abbott had not used electronic recording equipment to "record all the conversations that they spoke

about" (400). Counsel asked the jury to infer fabrication by the failure of Agent Abbott to have previously related his conversations with appellant to the grand jury (403). That failure was rhetorically coupled with Agent Abbott's precise recollection of appellant's statements during the criminal venture (402-403). Thus, defense counsel went on to refer to their testimony as having been "borrowed" and "subject to several doubts already" (408). Defense counsel's view of Abbott's and Coghlan's testimony was further highlighted by his gratuitous comment concerning the testimony of Griffith, the chemist: "I believe Mr. Griffith told the truth in all respects. He is a chemist, a professional man. . ." Thereafter, counsel contrasted the dispassionate testimony of the chemist with what he characterized as the "zeal" of the prosecution (419); a "zeal" necessitated by the circumstance that appellant, in contrast to Osborne, had not been found in possession of any of the narcotics. Thus, counsel stated:

> "Now, again that's Mr. Pascarella's job, and I don't quarrel with him for it. But it's also the job of these agents to make arrests and win cases. And in a case like this, when they have found no narcotics on the man, they have never seen him take money, they have never seen him deliver narcotics, they have never seen him with anybody or in anybody's place suspicious except two visits at this man Osborne's house, and short ones at that; it's just their word alone that this whole case rests on. And their (sic) that wasn't taken down, wasn't recorded, wasn't confirmed by the U.S. Attorney.
>
> Don't they have any of that zeal, any of that wanting to win, any of that wanting to improve their record, and couldn't their memories be a little more distinct and more clear in their minds today when they tried to reconstruct, without any record, what happened a year and a half ago, and maybe that zeal, or some of it, spilled out in this courtroom.

Could that color their recollection and their testimony, just a tiny little bit, mightn't it do the same to mine or somebody else's, if we were the prosecutors?

And in this case if that testimony was colored or changed, or misrecollected even a tiny little bit, then there is no evidence at all against this defendant" (419-420).*

The comments of the prosecutor, about which appellant complains, in the full context in which they were made at the beginning of the prosecutor's summation, were as follows:

I listened to summation of defense counsel, Mr. Handman, and it seemed to me a good part of the summation was that the Government witnesses lied. John Osborne and all of them. Well, if you believe Agent Coghlan lied, if you believe Agent Abbott lied, if you believe Agent Gormandy lied, if you believe John Osborne lied, then I say to you now, ladies and gentlemen——

Mr. Handman: Objection, your Honor.

Mr. Pascarella: (continuing)—acquit the defendant.

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* Following the conclusion of defense counsel's summation, Mr. Pascarella, the Assistant United States Attorney, made the following general objection:

"Your Honor, at this time I would mostly respectfully object to comments made by counsel in his summation regarding that—at least the innuendo—that to win a Government counsel or Government agent would color any testimony. I just wanted that noted on the record, your Honor" (422).

> Mr. Handman: As a matter of fact, I indicated that I agreed with the testimony of Agent Gormandy and Agent Wheeler, who were conducting surveillance, and the chemist also.[*]
>
> Mr. Pascarella: My recollection of Mr. Handman's summation was that he agreed with the parts that he has recited to you. I will cover Mr. Gormandy's and Mr. Wheeler's testimony again, and show you, or submit to you then, that it is consistent with [what] all the witnesses have spoken. And is it consistent because it is the truth?
>
> If, however, ladies and gentlemen, you believe the witnesses called by the Government, then it is up to you to hold Osmundo Rodriguez accountable for his crime (425-426).

In sum, the prosecutor did no more than state that if the jury believed that the witnesses called by the Government lied, they should acquit the appellant, but, on the other hand, if they believed the witnesses, appellant should be held accountable. The Assistant simply and properly framed the issue of credibility which is of course, present in any case, and, more particularly so in the case at bar by virtue of defense counsel's summation. See, *United States* v. *DeAngelis,* 490 F.2d 1004, 1011 (2d Cir. 1974; Mansfield, *J.*, concurring opinion) and cases cited therein; *United States* v. *Mattio,* 388 F.2d 368, 371 (2d Cir.), *cert. denied,* 390 U.S. 1043 (1968).

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* Certainly, if there had been any doubt as to the tenor of defendant's summation, defense counsel dispelled that doubt when, by implication, he took the opportunity in his objection to further urge that Abbott and Coghlan were lying. Thus, counsel stated that he "agreed" with the testimony of Gormandy and Wheeler as well as the chemist, Griffith, eloquently leaving unsaid his opinion of the undercover agents' testimony.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

August 16, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
JAMES A. PASCARELLA,
Assistant United States Attorneys,
Of Counsel.*

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* The United States Attorney's Office wishes to acknowledge the assistance of Barry C. Ross, a third year law student at Brooklyn Law School, in the preparation of this brief.

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STERN DISTRICT OF NEW YORK, ss:

AROLYN N. JOHNSON, being duly sworn, says that on the 19th

of August, 1974, I deposited in Mail Chute Drop for mailing in the

Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and

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hich the annexed is a true copy, contained in a securely enclosed postpaid wrapper

cted to the person hereinafter named, at the place and address stated below:

Richard I. Rosenkranz, Esq.

66 Court Street

Brooklyn, New York 11201

rn to before me this
th day of August, 1974

LGA S. MORGAN
ublic, State of New York
No. 24-4501966
ified in Kings County
on Expires March 30, 1971

Carolyn N. Johnson
CAROLYN N. JOHNSON

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

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United States Attorney,
Attorney for _____

To:

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Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

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Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COU
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within ____ _____is hereby admitted.

Dated: _____, 19

_____

Attorney for _____

FPI-LC-5M-8-73-7355